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In re application of: Hall, William A.

Serial No.: 10/721,299

Examiner: HUYNH, Louis K.

Filed: November 24, 2003

Group Art Unit: 3721

For: FOOD PACKAGING CLOSURE
APPARATUS

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REQUEST FOR REHEARING UNDER 37 CFR § 41.79

Applicant hereby requests a rehearing of the Board's Decision of April 11, 2007, in the above-referenced patent application.

It is respectfully submitted that the Board's interpretation of the language of the rejected claims is not in accordance with current patent case law, and specifically the case law cited in the Appeal Brief. Summarizing that case law here, for a prior art reference to anticipate a claim, every element of the claimed invention must be identically shown in the reference, *In Re Bond*. To determine whether a claim limitation is met literally where expressed as a means for performing a stated function, a court must compare the accused structure with the disclosed structure and must find equivalent structure as well as identity of claimed function for that

structure, *Pennwalt Corp. v. Durand-Wayland, Inc.* Words of a claim are generally given their ordinary and customary meaning. The ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art. The person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim, but in the context of the entire patent, *Philips v. AWH Corp.*

Claim 1

In the OPINION of the Board's Decision, in the discussion of claim 1, the "means for attaching the body second end to packaging of a food product" is interpreted as a "snug fit" between the body second end and the packaging. The OPINION references page 7, and lines 1-15 of the specification, for support in interpreting the "means for attaching the body second end to packaging of a food product" as a "snug fit."

However, there is no mention of a "snug fit" on page 7 of the specification as contended in the OPINION. The application specification specifically describes the food product being passed through the interior bore of the tubular body "so that the second end edge (34) of the tubular wall (22) engages tightly around the packaging (56) of the food product" (specification page 7, lines 4-6). The specification further describes the tubular body being constructed of a material "that gives the body a limited resilience, which would allow the second end edge (34) to stretch slightly and engage in a tight, sealing fit around the packaging (56) of the food product (14)" (specification page 7, lines 7-9). The specification also describes that "passing the food product (14) through the interior bore of the tubular body (16) will result in the second end edge (34) of the tubular body compressing the food product and engaging in a tight sealing fit around the packaging (56) of the food product" (specification page 7, lines 12-15).

Thus, there is no support in the specification for the Board's interpretation of the "means for attaching the body second end to packaging of a food product" as being a snug fit. The means for attaching recited in claim 1 instead provides a tight, sealing fit around the packaging of the food product.

In contrast, the Peebles reference only discloses engagement between the side walls 34 and end walls 36 of a pan 30 and a vertical portion 42 of the collar 20. The OPINION refers to column 3, lines 62-64, of the Peebles reference which states that "the vertical portion 42 of the collar 20 engages the side walls 34 and/or end walls 36 of the pan 30." This statement in the Peebles reference does not identically show the elements of the invention recited in claim 1, which is required for an anticipation rejection according to the case law cited in the Appeal Brief. The mere engagement between the collar vertical portion 42 and the sidewalls 34 and/or end walls 36 of the pan 30 does not identically show any structure that is capable of "attaching" as required by claim 1. From the Peebles reference it appears that lifting the pan 30 would separate the pan from the collar 20. There is no "attaching" between the pan 30 and the collar 20. There is no tight, sealing fit between the pan 30 and the collar 20. The Peebles reference does not disclose an equivalent structure that is capable of performing the identical function of "attaching the body second end to packaging of a food product" as required by claim 1. According to the cited case law, the Peebles reference does not anticipate claim 1. Claim 1, and its dependent claims 2-4, are therefore allowable over the Peebles reference.

Independent claim 6 includes a recitation of "the second end of the tubular body being adapted for attachment to a food product." For the same reasons discussed above with regard to claim 1, claim 6 is not anticipated by the Peebles reference and is allowable over the prior art.

Claims 7-13 all depend from claim 6 and are therefore also allowable over the Peebles reference.

Claims 7 and 8

In the OPINION, in the discussion of claims 7 and 8, it is stated Peebles' collar flange 24 and collar ridge 26 are both parts of a single rim-like top portion of the collar, and therefore, together they reasonably can be considered a rim that projects outwardly from the collar body.

It is respectfully submitted that whether these two separate component parts can reasonably be considered to be the one claimed component part as argued in the Appeal Brief

is not the proper test for anticipation. Patent case law requires that the prior art reference “identically show” a claim element in order to anticipate the claim. Whether a prior art reference could reasonably be considered to show the elements of a claim is not the proper test for anticipation. Because the Peebles reference does not identically show the subject matter of claims 7 and 8 as argued in the Appeal Brief, and as required by the cited case law, the reference does not anticipate the claims, and claims 7 and 8 are allowable over the prior art.

Claim 14

Independent claim 14 recites a method of preserving a food product in food packaging that has a food packaging opening, where one of the method steps includes positioning the second end of the tubular body on the food product so that the tubular body extends around the food packaging opening. In the OPINION, in addressing claim 14 it is stated that the specification does not define “food packaging.” This is incorrect. The first sentence of the specification states that the “present invention pertains to a food packaging closure apparatus that provides a removable lid on tightly packaged food products such as sausages, cookie dough and brick cheeses, where the lid is removably attached over a surface of the food product that has been exposed by cutting through the packaging of the food product.” Page 1, line 9 through page 2, line 17 of the specification further describes the type of food packaging with which the apparatus of the invention is used.

Instead of looking to the application specification for an interpretation of “food packaging” as advised in *Philips v. AWH*, the Board relies on the extrinsic evidence of a dictionary definition of “packaging.”

Extrinsic evidence is that evidence which is external to the patent and file history, such as expert testimony, inventor testimony, dictionaries, and technical treatises and articles. Extrinsic evidence in general, and expert testimony in particular, may be used only to help the court come to a proper understanding of the claims; it may not be used to vary or contradict the claim language.

Vitronics Corp. v. Conceptor Inc., 90 F.3d 1576, 39 U.S.P.Q. 1573, 1578 (Fed. Cir. 1996).

[D]ictionary definitions of ordinary words are rarely dispositive of their meanings in a technological context. A word describing patented technology takes its definition from the context in which it was used by the inventor.

AFG Industries, Inc. v. Cardinal IG Co., 239 F.3d 1239, 57 U.S.P.Q. 2d 1776, 1783 (Fed. Cir. 2001).

The dictionary definition of “packaging” relied on in the OPINION is not the meaning of the terms “food packaging” used in claim 14 and in the specification. Furthermore, the Peebles reference does not identically show a method of preserving a food product in food packaging that has a food packaging opening, including the step of “positioning the second end of the tubular body on the food product so that the tubular body extends around the food packaging opening,” recited in claim 14. The Peebles reference does not anticipate the subject matter of claim 14 under the cited case law. For the reasons set forth in the Appeal Brief, it is respectfully submitted that the Peebles reference does not strictly identify the method of claim 14 as required by patent case law, and does not anticipate claim 14. Claim 14 and its dependent claims 15-20 are therefore all allowable over the prior art.

Claims 6 and 15

In the OPINION, in the discussion of claims 6 and 15 it is recognized that independent claim 6 requires that the second end of the tubular body be resilient, and that claim 15 requires that the tubular body be made of a resiliently stretchable material and resiliently stretching the second end of the tubular body. The OPINION recognizes that the Peebles reference is silent as to whether the cover is rigid or resilient. This appears to be an admission in the OPINION that the Peebles reference does not identically show a resilient body or the step of resiliently stretching the body second end, and therefore does not identically show the subject matter of claims 6 and 15. Under the case law cited in the Appeal Brief, the Peebles reference fails to anticipate claims 6 and 15, and claims 6 and 15 are allowable over the prior art.

For the reasons set forth above, it is respectfully submitted that the Decision of the Board is not supported by patent case law, and therefore the rejections of claims 1-20 in view of the Peebles reference should be reversed and the claims allowed.

Respectfully submitted,

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